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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY C. ROMERO

Defendant and Appellant.

2d Crim. No. B235902
(Super. Ct. No. 2011011612)
(Ventura County)

Anthony C. Romero (Romero) appeals from the judgment following his convictions of carrying a loaded firearm, in violation of former Penal Code section 12031, subdivision (a)(2)(F), and street terrorism, in violation of section 186.22, subdivision (a).¹ He challenges the legality of the search that revealed the firearm, and the sufficiency of the evidence underlying the street terrorism conviction. We reject his challenge to the search and affirm the firearm conviction.

We need not address Romero's sufficiency-of-the-evidence challenge to the street terrorism conviction because our Supreme Court's recent decision in *People v. Rodriguez* (2012) 55 Cal.4th 1125 (*Rodriguez*), requires us to reverse that conviction.

¹ Unless otherwise indicated, all statutory references are to the Penal Code.

We accordingly vacate the judgment on the street terrorism conviction and remand for the trial court to consider whether resentencing is necessary.

FACTS AND PROCEDURAL HISTORY

I. The Crimes

Romero was arrested while in possession of loaded .32-caliber firearm with a round in the chamber. A gang expert testified that Romero was a member of the Oxnard-based Colonia Chiques street gang and that his possession of a loaded weapon furthered the gang's reputation by enabling him to assault rival gang members.

II. The Suppression Motion

On the afternoon of April 2, 2011, Oxnard Police Officer Gordon Currie saw Romero riding his bicycle on the sidewalk. This violated the Oxnard Municipal Code and is punishable by a fine. Immediately after pulling over and getting out of his patrol car to talk to Romero, Officer Currie noticed that Romero had a "dry mouth," and saw from the veins in his neck that he had a rapid heart rate. Officer Currie recognized both symptoms as possible signs of drug use.

Officer Currie asked Romero for permission to pat him down, and Romero agreed. During the patdown, Officer Currie could feel Romero's rapid heartbeat through his clothing and also noted that his eyes were bloodshot and his tongue coated. These were further symptoms of drug use. Officer Currie next asked him two or three times for permission to search the backpack he wore, but Romero refused.

Officer Currie directed Romero to sit on the curb. Because Romero had said he had been riding home from a gym workout, Officer Currie decided to wait a few minutes before conducting any drug recognition tests. This way, he could be sure that any negative results were due to drug use and not Romero's recent physical activity. Officer Currie spent a few minutes filling out a field identification card on Romero before administering drug recognition tests. The tests confirmed Officer Currie's earlier observations. He arrested Romero for being under the influence "of a CNS stimulant, possibly poly use." Up to this point, the encounter had lasted at most 20 minutes.

Officer Currie then searched Romero's backpack. Among other things, he found the firearm and a second, fully loaded magazine. At the police station, Romero submitted to a presumptive urine test that came back negative for four drugs—cocaine, THC, opiates and methamphetamine.

Romero moved to suppress the gun. After an evidentiary hearing, at which Officer Currie and Romero both testified, the trial court denied the motion. The court ruled that Officer Currie lawfully seized the gun as the fruit of a search incident to arrest. The court found Romero's arrest lawful under two alternative theories: (1) Officer Currie had probable cause to arrest Romero for the bicycle violation; and (2) Officer Currie had developed probable cause to arrest Romero for drug use while observing him during their initial, consensual encounter.

III. *Trial and Sentencing*

Following denial of the suppression motion, the case proceeded to trial. The jury convicted Romero of both counts. The court imposed a sentence of three years' formal probation, with a county jail sentence of time served and other terms and conditions.

DISCUSSION

I. *The Trial Court Properly*

Denied the Motion to Suppress

In reviewing the trial court's suppression motion, we ". . . defer to the trial court's factual findings . . . where supported by substantial evidence . . .," but evaluate the reasonableness of the search or seizure independently. (*People v. Weaver* (2001) 26 Cal.4th 876, 924.)

We hold that each of the trial court's alternative rationales for upholding the search of the backpack is consistent with the Fourth Amendment. Our Supreme Court in *People v. McKay* (2002) 27 Cal.4th 601, 617-618, held that a search incident to an arrest for a fine-only offense is valid under the Fourth Amendment. There is no dispute that Officer Currie had probable cause to believe Romero violated the Oxnard bicycling law. Officer Currie's decision not to arrest him immediately did not negate that probable cause

or otherwise invalidate the search of the backpack, which was contemporaneous with the arrest itself.

The trial court also acted correctly in concluding, in the alternative, that the gun was lawfully seized in a search incident to arrest for drug use. Officer Currie's observations supplied sufficient probable cause to believe Romero was under the influence of narcotics. Moreover, Officer Currie made those observations lawfully. The encounter was consensual until Officer Currie directed Romero to sit on the curb (*In re Manuel G.* (1997) 16 Cal.4th 805, 821), and his observations up to that point provided reasonable suspicion to justify detaining Romero for further investigation.

In addition to disputing the trial court's alternative rationales, Romero raises three other arguments. He contends that Officer Currie's search is invalid because he turned out to be wrong about his drug use. However, probable cause turns on "a probability or substantial chance of criminal activity, not an actual showing of such activity." (*Illinois v. Gates* (1983) 462 U.S. 213, 243, 245 at fn. 13.) "[A] finding of probable cause may not be defeated by an after-the-fact showing that the information . . . provided was mistaken. [Citations.]" (*Arizona v. Evans* (1995) 514 U.S. 1, 17.)

Romero next asserts that Officer Currie's suspicions about drug use were a little more than a pretext for searching his backpack. Officer Currie's subjective motivations are irrelevant to any Fourth Amendment analysis. (*Whren v. U.S.* (1996) 517 U.S. 806, 813.)

Romero lastly posits that a court may not justify the search as incident to an arrest for the bicycling violation because Officer Currie did not arrest him for that violation. In Romero's view, there was accordingly no arrest and, under *Knowles v. Iowa* (1998) 525 U.S. 113, could not be a search incident to arrest. *Knowles* itself is inapplicable because Romero was, in fact, arrested. More to the point, Officer Currie's contemporaneous reason for the arrest is irrelevant to the Fourth Amendment analysis. Reviewing courts must uphold an arrest on *any* valid, objective basis appearing in the record—even if it is not the one the arresting officer actually entertained. (*Devenpeck v.*

Alford (2004) 543 U.S. 146, 153-154). Here, the record discloses probable cause to arrest Romero for the bicycle offense. The trial court properly denied the suppression motion.

II. *The Street Terrorism Conviction*

In *Rodriguez*, our Supreme Court held that the crime of street terrorism requires the involvement of more than one gang member and consequently cannot be committed by a gang member acting alone. (*Rodriguez, supra*, 55 Cal.4th at pp. 1131-1139.) There is no dispute that Romero acted alone in carrying the loaded firearm in this case. Because *Rodriguez's* construction of section 186.22, subdivision (a) applies retroactively to Romero (*Burris v. Super. Ct.* (2005) 34 Cal.4th 1012, 1023), *Rodriguez* compels the conclusion that Romero's street terrorism conviction must be overturned.

DISPOSITION

We affirm the judgment of conviction on the loaded firearm offense, but vacate the judgment of conviction on the street terrorism offense and remand for the trial court to consider whether resentencing is necessary.

HOFFSTADT, J.*

We concur:

GILBERT, P.J.

PERREN, J.

* Assigned by the Chairperson of the Judicial Council.

James P. Cloninger, Judge
Superior Court County of Ventura

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